89 (3)

CAPITAL CASE 1-16-08

IN THE SUPREME COURT OF THE UNITED STATES

LARRY NORRIS, Director,
Arkansas Department of Correction *PETITIONER*

v. 07-653

SEDRICE MAURICE SIMPSON *RESPONDENT*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Norris frames the question presented as whether the legal basis for an Eighth Amendment claim is unavailable and excuses procedural default, when the same claim was available in state court.

Simpson disagrees with that formulation of the question. Besides the procedural issues addressed in this Brief in Opposition, Simpson submits the question is more properly phrased thus:

When the Supreme Court explicitly overrules prior precedent and recognizes a new rule of constitutional law absolutely barring the death penalty for anyone falling within its scope, may a habeas claim under the new rule be defeated by a failure to pursue a similar state statutory claim at a time when the federal constitutional claim did not exist?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

I. The Question Presented Was Not Passed On In Either Of The Lower Courts, Was Not Raised By Norris Until He Filed For Certiorari, And Has Never Been Decided By The Eighth Circuit Court Of Appeals. ... 1

II. Neither The Question Presented—Nor The Issue Actually Decided—Presents Any Division Of Authority. 7

III. Even If the Lower Courts Had Decided the Question of Whether an Independent and Adequate State Law Ground Precludes Relief on Mr. Simpson's Claim, and Found That He Failed to Show Cause to Excuse That Procedural Default, the Judgment Would Be Independently Supported by the Applicability of the Miscarriage of Justice Exception. 8

IV. The *Teague v. Lane* exceptions apply. 11

CONCLUSION 15

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Constitutional provisions

Eighth Amendment ..... i, 1, 3, 9, 12-14

Statutes

28 U.S.C. § 2254(e)(2) 1, 3-5, 7, 10, 11, 14

Ark. Code Ann. § 5-4-618 1

Cases

Atkins v. Virginia, 36 U.S. 304, 122 S.Ct. 2242 (2002) 1, 3, 4, 6, 7, 9-13

Belcher v. Stengel, 429 U.S. 118, 97 S.Ct. 514 (1976) 8

Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604 (1998) 12

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) 14

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1992) 2, 9

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) 11

Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211 (1989) 1-3, 6, 10, 14

Ex Parte Royall, 117 U.S. 241, 252 (1886) 5

Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074 (1996).....2

In re Hen House Interstate, 177 F.3d 719 (8th Cir. 1999) (en banc) 4

Horn v. Banks, 536 U.S. 266, 122 S.Ct. 2147 (2002).....13

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 8

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 79 S.Ct. 710 (1959) 9

Moore v. Texas, 535 U.S. 1110, 122 S.Ct. 2350 (2002) 9

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986) 9

Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842 (2007) 13

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989).....12, 14

Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257 (1990).....12

Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822 (1990).....14

Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).....9

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995) 9

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (2004) 12

Simpson v. Norris, 04-429 (E.D. Ark.) 3

Simpson v. Norris, No. 06-2823 (8th Cir.) 3

Smith v. Butler, 366 U.S. 161, 81 S.Ct. 937 (1961) 4

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989).....11-14

United States v. Webster, 421 F.3d 308 (5th Cir. 2005).....7

Walker v. True, 399 F.3d 315 (4th Cir. 2005) 7

Whorton v. Bockting, ___ U.S. ___, 127 S.Ct. 1173 (2007) 11, 12

Williams v Taylor, 529 U.S. 420, 120 S. Ct. 1479 (2000).....11

Woodford v. Ngo, 126 S. Ct. 2378 (2006) 5

Treatises and other authorities

Hertz & Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 2

Stern et al., *Supreme Court Practice* (8th ed. 2002).....6

Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH & LEE L. REV. 271 (2006) 7

REASONS FOR DENYING THE WRIT

I. The Question Presented Was Not Passed On In Either Of The Lower Courts, Was Not Raised By Norris Until He Filed For Certiorari, And Has Never Been Decided By The Eighth Circuit Court Of Appeals.

One reason that certiorari should be denied because the sole issue raised by the Petition was not decided by either the Eighth Circuit Court of Appeals or the district court. Norris's Question Presented asks whether an Eighth Amendment claim of ineligibility for execution on grounds of mental retardation should be considered unavailable prior to this Court's decision in *Atkins v. Virginia*, 36 U.S. 304, 122 S.Ct. 2242 (2002), so as to establish cause for a petitioner's failure to raise the claim in state court proceedings that preceded *Atkins*, although an allegedly similar claim was available under state law, Ark. Code Ann. § 5-4-618.

In this Court, Norris raises an argument resting entirely upon this Court's decision in *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211 (1989), a case involving the application of the adequate and independent state procedural grounds doctrine and the cause and prejudice exception thereto. The sole issue decided by the Eighth Circuit and the district court, however, was the wholly distinct question of whether Simpson was entitled to a federal evidentiary hearing on his Eighth Amendment claim under 28 U.S.C. § 2254(e)(2). Neither court addressed either the applicability of the

adequate and independent state procedural grounds doctrine in this case, or the availability of the cause and prejudice exception, and Norris raises his *Adams* argument for the first time in his petition to this Court.

Pursuant to the doctrine of adequate and independent state grounds, if a federal habeas petitioner failed to comply with a state procedural rule when he presented a federal constitutional claim to the state courts, he may be barred from receiving federal habeas review of the claim. *See generally* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1 at 1249–50 (5th ed. 2005). If the petitioner has not actually presented his claim to the state courts, but it is clear that, if he did so, he would be found to have violated a state procedural rule, the same result obtains. *See Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S.Ct. 2074, 2080 (1996). If a claim is found to be subject to a procedural bar under the doctrine of adequate and independent state grounds, a petitioner will nevertheless be entitled to federal review of the claim if he can show either (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law," or (2) a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1992).

None of the decisions below addressed either the adequate and independent state grounds or either of the exceptions thereto. To the contrary, the district court

ruled only that Mr. Simpson was not entitled to an evidentiary hearing pursuant to 28 U.S.C. § 2254(e)(2) because he "failed to develop the factual basis" of his mental retardation claim in state court. Pet. App. 37. After judgment, Norris defended the district court's decision on this same ground, arguing that the district court "properly concluded" that Mr. Simpson "could not satisfy the requirement of developing the factual basis of a mental retardation claim in state court as required by 28 U.S.C. § 2254(e)(2)." *See Simpson v. Norris*, 04-429 (E.D. Ark.) (Resp. Mot. Alter Amend) [Doc. 17]. In an opinion declining to revisit its judgment, the district court reiterated that it was holding that, "pursuant to 28 U.S.C. § 2254(e)(2), the Court may not hold an evidentiary hearing" on Simpson's *Atkins* claim. Pet. App. 68.

On appeal, Norris once again defended the district court's decision as a correct application of § 2254(e)(2). *See Simpson v. Norris*, No. 06-2823 (8th Cir.) (Br. Appellee) [Doc. 2112307] (arguing that the district court "properly concluded" that Simpson "could not satisfy the requirement of development the factual basis of a mental retardation claim in state court as required by 28 U.S.C. § 2554(e)(2)"). Norris did not ask the court of appeals to affirm on the alternate ground of adequate, independent state ground. Much less did Norris cite *Adams* or argue, as he does now for the first time, that an Arkansas state law violation is a necessary element of an Eighth Amendment mental retardation claim.

In light of the foregoing, it is not surprising that the Court of Appeals's opinion on Mr. Simpson's *Atkins* claim addressed only § 2254(e)(2)'s statutory restriction on the availability of federal evidentiary hearings and did not decide (or even mention) anything about a possible adequate-and-independent-state-ground bar. The court of appeals held only, "We conclude . . . the district court incorrectly required Mr. Simpson to meet the requirements of § 2254(e)(2) before holding an evidentiary hearing." Pet. App. at 11. The possible application of a procedural bar based upon the principle of adequate and independent state ground and absence of cause to excuse it under *Adams* was raised for the first time in this case, *sua sponte*, by Judge Colloton in his dissent from denial of rehearing en banc. Pet. App. 73. A majority of the Court of Appeals nevertheless declined to rehear the case on the ground urged by Judge Colloton, in accordance with Eighth Circuit precedent disallowing consideration of new issues at the rehearing stage. *See, e.g., In re Hen House Interstate*, 177 F.3d 719, 724–25 (8th Cir. 1999) (en banc).

It is well established that this Court does not grant certiorari to consider issues that were not decided below. *See, e.g., Smith v. Butler*, 366 U.S. 161, 81 S.Ct. 937 (1961) (dismissing certiorari as improvidently granted because "the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted"). Norris's Petition should be denied because neither the district court nor the Court of

Appeals passed on the issue he now asks this Court to decide.

The distinction between the issue Norris raises now and the issue actually decided is no mere technicality. The portion of the Antiterrorism and Effective Death Penalty Act (AEDPA) codified by § 2254(e)(2) operates, when it applies, to preclude further factual development of a claim through a federal evidentiary hearing. In contrast, the practice of declining to review in federal court claims upon which relief is barred by an adequate, independent state law ground is a judicial policy adopted by this Court in order to encourage habeas petitioners to give state courts the first opportunity to pass upon their federal claims. *See, e.g.*, *Woodford v. Ngo*, 126 S. Ct. 2378, 2386 n.2 (2006) (describing the habeas corpus procedural default rule as "judge-made doctrine"). Its effect, where it applies, is to bar a claim from being considered on the merits altogether, whether or not new factual development would be required. Furthermore, while the exceptions and exclusions to the operation of § 2554(e)(2) are defined by a single 1996 statute, the scope of the adequate-and-independent-state-ground bar is elaborated by a complex doctrinal framework developed by this Court over 120 years. *See, e.g.*, *Ex Parte Royall*, 117 U.S. 241, 252 (1886) (explaining that, before bringing a petition for writ of habeas corpus, a state prisoner must give "the state court of original jurisdiction" the opportunity to "pass upon the question which is raised as to the constitutionality" of the prisoner's conviction).

Norris asks this Court to exercise its certiorari jurisdiction based upon purported conflict between the decision below and *Adams*; yet, for certiorari to be justified solely on a purported conflict with this Court's decisions, the conflict "must truly be direct and must be readily apparent from the lower court's rationale or result." Robert L. Stern et al., *Supreme Court Practice* 233 (8th ed. 2002). The differences between § 2254(e)(2)'s restrictions on evidentiary hearings and the existence of an adequate, independent state ground reveal that the Eighth Circuit's decision does not even impliedly, much less directly and readily, implicate *Adams*. Not only was the potential interplay between *Adams* and *Atkins* not addressed by the Eighth Circuit Court of Appeals in this case, it has never been addressed by that court (or, as explained in Section II, *infra*, by any other). That the Eighth Circuit is still free to adopt Norris's position if it is timely presented to that court in a later case is another reason why this Court's intervention is unnecessary. *See* Stern et al., *supra*, at 330 (certiorari will be dismissed as improvidently granted where "[a]n intervening court decision . . . may eliminate the issue or make it unlikely that the question will arise again").

II. Neither The Question Presented—Nor The Issue Actually Decided—Presents Any Division Of Authority.

The Petition does not argue that certiorari should be granted to resolve a split among the circuits—and for good reason. There is no division of authority on either the issue that Norris asks this Court to decide (the applicability of the adequate and independent state ground doctrine) or the different issue actually decided below (the applicability of § 2254(e)(2)). This fact, too, counsels denial of certiorari. *See, e.g.*, Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH & LEE L. REV. 271, 275 (2006) (noting that this Court is "a source of structure, guidance, and uniformity" rather than a "traditional court of appeals that reviews the correctness of lower court opinions").

Only one court of appeals has mentioned the question raised in Norris's Petition, and that court expressly avoided deciding it. *See United States v. Webster*, 421 F.3d 308, 310–11 (5th Cir. 2005). Only one court of appeals besides the Eighth Circuit Court of Appeals has addressed the issue actually decided below, i.e., whether § 2254(e)(2) bars an evidentiary hearing on a mental retardation claim for a prisoner whose state challenges were exhausted by the time *Atkins* was decided. That decision accords with the decision *sub judice*, as the court below noted. Pet. App. 12 (citing *Walker v. True*, 399 F.3d 315, 326–27 (4th Cir. 2005) (holding that "[s]ection 2254(e)(2) does not apply" since "*Atkins* was decided after Walker's conviction became final")). Since this case implicates no conflict among decisions,

certiorari should be denied. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392–93 (1923) (certiorari dismissed as improvidently granted; "there was no ground for our allowing the writ of certiorari" where apparently conflicting decisions between two circuits "were really in harmony").

III. Even If the Lower Courts Had Decided the Question of Whether an Independent and Adequate State Law Ground Precludes Relief on Mr. Simpson's Claim, and Found That He Failed to Show Cause to Excuse That Procedural Default, the Judgment Would Be Independently Supported by the Applicability of the Miscarriage of Justice Exception.

As noted above, the exercise of certiorari jurisdiction is inappropriate in this case because the question on which Respondent seeks review was never addressed by either the Court of Appeals or the district court. Certiorari review is also unwarranted on the additional ground that, even if the Eighth Circuit had addressed the question of procedural default, and had found no cause for the failure to raise the claim in state court, any such failure would be excused by operation of the miscarriage of justice exception to the procedural default doctrine. The judgment of the Eighth Circuit would therefore be affirmed on this independent ground, irrespective of whether the cause and prejudice exception is or is not deemed applicable. *See, e.g., Belcher v. Stengel*, 429 U.S. 118, 119, 97 S.Ct. 514 (1976) (per curiam) (dismissing writ of certiorari as improvidently granted where lower court's decision clearly correct on other ground and resolution of question presented therefore unnecessary); *The*

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 182–84, 79 S.Ct. 710, 711 (1959) (same). A habeas petitioner's failure to raise his constitutional claim in state court is excused not only if he can show cause and with respect to the default, *see* Section I, *supra*, but also if the absence of federal court review would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, *supra*. The miscarriage of justice exception applies if a petitioner can show that he is actually innocent of the crime of which he has been convicted. *Schlup v. Delo*, 513 U.S. 298, 327-28, 115 S.Ct. 851, 867 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 494, 496, 106 S.Ct. 2639 (1986)). The exception also extends to what is known as actual innocence of the death sentence. If the prisoner can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty," a federal court may reach the merits of otherwise defaulted or abusive claims. *Sawyer v. Whitley*, 505 U.S. 333, 335–36, 112 S.Ct. 2514, 2516 (1992). As a person with mental retardation, who is categorically exempt from the death penalty pursuant to the Eighth Amendment Cruel and Unusual Punishment Clause, *Atkins*, 536 U.S. at 318, Simpson readily satisfies the criteria for application of this exception. *Cf. Moore v. Texas*, 535 U.S. 1110, 122 S.Ct. 2350, 2354 (2002) (Scalia, Rehnquist and Thomas, JJ., dissenting from grant of stay of execution) (noting that, if

Atkins should forbid execution of mentally retarded, miscarriage of justice exception could excuse failure to raise such a claim in state courts).

Accordingly, any failure to raise a claim of mental retardation in state court that could have been attributed to Simpson would be excused by the miscarriage of justice exception to the doctrine of procedural default, and the Eighth Circuit's judgment must be sustained on this independent ground, irrespective of the applicability of the cause and prejudice exception. It is therefore unnecessary for this Court to exercise its limited certiorari jurisdiction to review the issue of cause and prejudice. Indeed, because the miscarriage of justice exception applies to all *Atkins* claims, the application of the cause and prejudice exception addressed in *Adams* will never be determinative in such a case, and so the issue raised by Norris cannot be deemed an important question of federal law worthy of this Court's attention. As a matter of statutory interpretation as well, the issue of whether an evidentiary hearing is required on remand was also correctly resolved in favor of Simpson. 28 U.S.C. §2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on--
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable

Although this Court has not specifically held *Atkins* by name to be retroactive yet, it clearly is under any rational application of the rules of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), as discussed below.

IV. The *Teague v. Lane* exceptions apply.

Norris argued below in his petition for rehearing that the Eighth Circuit panel opinion conflicts with 28 U.S.C. § 2254 and *Williams v Taylor*, 529 U.S. 420, 120 S. Ct. 1479 (2000). Norris's position assumes, and can only make sense if, the Antiterrorism and Effective Death Penalty Act (AEDPA) were to have wholly supplanted the pre-existing rule of *Teague*. However, that is most definitely not the position of this Court. Rather, *Teague* is still good law, and ergo the retroactivity analysis set forth in Teague— the very heart of *Teague*--- is also good law.

In *Whorton v. Bockting*, ___ U.S. ___, 127 S.Ct. 1173 (2007), this Court was confronted with the question whether *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), was retroactive. The Court explicitly engaged in *Teague* analysis. It held that *Crawford* presented a new rule but did not fit the *Teague* exceptions. Indeed the *Teague* discussion was the bulk of the unanimous opinion. Clearly, *Atkins* presents a new rule for *Teague* purposes. It explicitly overruled a decision — *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), which was precisely on

point: Whether the Eighth Amendment prohibits execution of the retarded. *Penry* held it did not. *Atkins* held that it did.

Thus, the next question is whether the *Teague* exceptions apply to the issue presented in this case. They do, particularly the first one. As *Whorton* noted, retroactive applications of decisions announcing changes in substantive law are not barred by *Teague*, but rather are part of the first *Teague* exception. *Atkins* announced a substantive rule as that term was established in *Teague* and discussed in *Schriro v. Summerlin*, 542 U.S. 348, 351-352, 124 S.Ct. 2519, 2522-2523 (2004):

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see Bousley v. United States, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see Saffle v. Parks, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). FN4 Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. Bousley, supra, at 620, 118 S.Ct. 1604 (quoting Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).
>
> FN4. We have sometimes referred to rules of this latter type as falling under an exception to Teague's bar on retroactive

> application of procedural rules, see, e.g., Horn v. Banks, 536 U.S. 266, 271, and n. 5, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (per curiam); they are more accurately characterized as substantive rules not subject to the bar.

It must be beyond dispute that *Atkins* ' announcement that the Eighth Amendment prohibits execution of the retarded is a substantive proclamation, not procedural. It squarely places the death-sentenced retarded person in the position of facing "a punishment that the law cannot impose upon him."

The second *Teague* exception—the watershed rule—also would apply. To the extent that a ban on execution of the retarded is regarded as procedural, the presence or absence of retardation necessarily affects the accuracy of the criminal proceeding vis-a-vis the sentence. Retardation imposes an absolute ban on execution undefeatable by any number or weight of aggravating circumstances.

This Court's very recent decision in *Panetti v. Quarterman*, U.S. , 127 S.Ct. 2842 (2007), also provides a perspective on this analysis. Although *Panetti* dealt with application of the "second or successive" petition rule with regard to a Ford claim and not an Atkins claim, *Panetti* more broadly stands for the proposition that AEDPA's version of § 2254 will be interpreted liberally enough that an otherwise meritorious death-excluding claim will not be defaulted just because it had not been raised in an earlier context where it could not have succeeded. In *Panetti* the excusal was because the *Ford* claim would have been premature. In this case, it is because, as a Eighth Amendment claim, it would have been barred by *Penry*. *Dugger v. Adams* deals with a trial evidence issue—a *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct.

2633 (1985) violation— and not with a matter involving actual innocence of the death penalty. This Court has already drawn that distinction in *Sawyer v. Smith*, 497 U.S. 227, 229, 110 S.Ct. 2822, 2824-2825 (1990):

> We must decide in this case whether a prisoner whose murder conviction became final before our decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. We hold that he cannot, for Caldwell announced a new rule as defined by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and the new rule does not come within *Teague's* exception for watershed rules fundamental to the integrity of the criminal proceeding.

Clearly, therefore, Simpson is entitled under this Court's precedents to pursue a previously unavailable Eighth Amendment retardation claim. The Eighth Circuit's disposition of the case should not be disturbed.

CONCLUSION

Wherefore, for the reasons discussed herein, Simpson prays that this Court deny Norris's Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served copies of the foregoing on Dustin McDaniel, Attorney General (Attn: Lauren Heil), 323 Center St., Little Rock, AR 72201 by first class mail this ____ day of January, 2008.

_____
JEFFREY M. ROSENZWEIG